Sipadan Dive Centre Sdn Bhd & Ors v The State Government of the State of Sabah

HIGH COURT (KOTA KINABALU) — SUIT NO K22–44 OF 2007–II(I)
DAVID WONG J
19 OCTOBER 2010

Civil Procedure — Parties — Proper party to action — Whether defendant had ceased to have administrative jurisdiction of island

Land Law — Licence — Occupation of island reserved as bird sanctuary — Whether plaintiffs had licence to operate as diving operators on island — Whether defendant proper party to action — Whether defendant had acquiesced to presence of plaintiffs on island — Whether plaintiffs were given sufficient notice to vacate island — Whether licence could be revoked — Whether there was breach of legitimate expectation — Whether plaintiffs entitled to damages or compensation — Sabah Land Ordinance s 28(2)

The first to fourth plaintiffs were companies that were operating resorts with full board and lodging that provided diving facilities on Sipadan Island ('the island') since the 1990s. By virtue of *Gazette* Notification No 69/133, which was made pursuant to s 28(2) of the Sabah Land Ordinance, the island was to be reserved as a bird sanctuary. On 24 September 1997, the island was declared as a protected area under the Protected Areas and Protected Places Act 1959 with all movement to be brought under the control of the Biro Keselamatan Negara ('BKN'). Sometime in November 1997, the four plaintiffs together with two other diving operators on the island incorporated the fifth plaintiff to liaise with BKN and to handle all matters related to diving activities on the island. In meetings with the plaintiffs and the two other diving operators on the island BKN had directed the former to come up with proposals to address the future of diving operations and conservation on the island. Accordingly the fifth plaintiff had prepared two proposals to address these matters. However, on 26 March 2004, the deputy state secretary's office issued a notice to all the six diving operators on the island to demolish all structures or buildings on the island and vacate the island on or before 31 December 2004 on the grounds that Malaysia had to fulfill its international obligations following the decision of the International Court of Justice on the ownership of the island. When the plaintiffs sought clarification the defendant issued another letter citing conservation matters as reasons for issuing the directive to the six diving operators to vacate the island. By 1 January 2005, the first to fourth plaintiffs had ceased all operations on the island and started dismantling the buildings

for removal. Thereafter the plaintiffs had requested for and obtained an extension of time from the state security for the demolition and removal of buildings and structure materials from the island. Despite the said extension the first to fourth plaintiffs had not completed the demolition as directed and their buildings and structures were subsequently demolished and removed by BKN. The plaintiffs then commenced the present suit against the defendant wherein they claimed for, inter alia, damages for the wrongful demolition of their buildings, for the loss of their equitable or proprietary interests in their diving resorts on the island and for the loss of their legitimate expectations. It was the plaintiffs' case that the defendant had recognised the presence of the plaintiffs on the island and had acquiesced to it. The plaintiffs further submitted that the defendant's request to the fifth plaintiff to prepare a plan to address the future of diving operations and conservation on the island had created a legitimate expectation that the plaintiffs would be allowed to continue operating on the island even after Malaysia had gained sovereignty over the island. The defendant submitted that it had been wrongly named in this suit and that BKN should have been made a party to the suit. It was the defendant's contention that at the material time the administrative jurisdiction of the island was not with the defendant but with BKN by virtue of the fact that on 24 September 1997 the island was declared a protected area pursuant to the Protected Area Order 1997, a Federal Act. The defendant further submitted that with effect from 1 February 1933 all rights prior or title on the island were extinguished and that the island could not be used for any other purpose other than as a bird sanctuary.

Held, allowing the plaintiffs' claim with costs to be taxed:

(1) The defendant's contention that BKN was the proper party to this action was never pleaded by the defendant and no attempt was made to amend the pleadings during the trial. Further the fact that the island was declared a protected area did not mean that the defendant had given up sovereignty of the island as ownership remained with the defendant. If the defendant's contention was to be sustained it would mean that the Federal Government could turn any state land into federal land by a mere declaration pursuant to the Protected Area and Protected Places Act but that was not and could not be the status of the relationship between the federal and state governments. In any event, the conduct of the defendant during the material times was contrary to the defendant's contention that it had ceased to have administrative jurisdiction of the island. Accordingly, the defendant's submission that the plaintiffs had sued the wrong party was rejected (see paras 34, 37 & 39–40).

(2) Upon applying the law on what amounts to acquiescence to the factual matrix it was found that the defendant had acquiesced to the presence of the plaintiffs on the island. Although the *Gazette* notification provided that the island was to be used as a bird sanctuary, this did not mean that

the island could not be used for any other purposes, especially if that purpose did not harm or impede the declared purpose of bird preservation. From the undisputed evidence of the presence of the diving operators on the island for so many years, it was concluded that the defendant had held the view that that the presence of the diving operators did not impede or harm the use of the island as a bird sanctuary. In the present case there was no evidence that the existence of the diving operators had harmed the bird species (see paras 44, 47 & 51).

(3) Based on the evidence it was found that the plaintiffs had obtained economic benefits from their diving operations which were at best conducted on a licence impliedly given by the defendant. That licence could be revoked upon a change of policy by paying reasonable compensation to the plaintiffs. As such, the plaintiffs were entitled to compensation or damages determined by the length of time they were given to wind down their businesses on the island. Based on the circumstances of this case, there was a breach of legitimate expectation as the plaintiffs were not given reasonable notice to wind down their business. That length of period and damages was to be determined by the registrar (see para 63).

[Bahasa Malaysia summary

Plaintif pertama hingga plaintif keempat merupakan syarikat-syarikat yang mengendalikan tempat peranginan dengan penginapan dan sarapan pagi yang mana menyediakan kemudahan menyelam di Pulau Sipadan ('pulau') sejak tahun 1990-an. Menurut Warta Pemberitahuan No 69/133, yang mana dibuat berikutan s 28(2) Ordinan Tanah, pulau tersebut adalah untuk dirizab sebagai tempat perlindungan burung. Pada 24 September 1997, pulau tersebut diisytiharkan sebagai kawasan larangan di bawah Akta Kawasan Larangan dan Tempat Larangan 1959 di mana kesemua pengendalian telah dibawa di bawah kawalan Biro Keselamatan Negara ('BKN'). Sekitar November 1997, keempat-empat plaintif bersama dua pengendali penyelaman di pulau tersebut menubuhkan plaintif kelima untuk berurusan dengan BKN dan mengendalikan semua perkara berkaitan dengan aktiviti-aktiviti menyelam di pulau tersebut. Dalam mesyuarat-mesyuarat bersama plaintif-plaintif dan dua pengendali penyelaman yang lain di pulau tersebut, BKN telah mengarahkan plaintif-plaintif untuk memberi cadangan untuk menangani masa hadapan operasi penyelaman dan pemuliharaan pulau tersebut. Maka, plaintif kelima telah menyediakan dua cadangan untuk menangani perkara-perkara tersebut. Walau bagaimanapun, pada 26 Mac 2004, pejabat timbalan setiausaha negeri telah mengeluarkan notis kepada keenam-enam pengendali penyelaman di pulau untuk merobohkan kesemua struktur atau bangunan di pulau dan mengosongkan pulau tersebut pada atau sebelum 31 Disember 2004 atas alasan bahawa Malaysia hendaklah memenuhi kewajipan antarabangsa berikutan keputusan Mahkamah Kehakiman Antarabangsa mengenai

pemilikan pulau tersebut. Apabila plaintif-plaintif memohon penjelasan, defendan mengeluarkan satu lagi surat menyatakan perkara pemuliharaan sebagai sebab-sebab pengeluaran arahan kepada enam pengendali penyelaman untuk mengosongkan pulau tersebut. Menjelang 1 Januari 2005, plaintif pertama hingga keempat telah memberhentikan kesemua operasi di pulau tersebut dan mula merobohkan bangunan-bangunan untuk pengalihan. Kemudian itu, plaintif-plaintif telah memohon untuk dan memperolehi lanjutan masa daripada sekuriti negeri untuk perobohan dan pemindahan bangunan-bangunan dan bahan-bahan struktur dari pulau tersebut. Di sebalik lanjutan tersebut, plaintif pertama hingga keempat gagal menyempurnakan perobohan seperti yang diarahkan dan bangunan-bangunan serta struktur-struktur mereka kemudiannya diroboh dan dipindahkan oleh BKN. Plaintif-plaintif kemudian memulakan guaman ini terhadap defendan di mana mereka menuntut, antara lain, ganti rugi untuk perobohan secara salah bangunan-bangunan mereka, untuk kehilangan kepentingan ekuiti atau proprietari tempat peranginan mereka di pulau tersebut dan untuk kehilangan harapan yang sah mereka. Adalah menjadi kes plaintif-plaintif bahawa defendan telah mengiktiraf kehadiran plaintif-plaintif di pulau tersebut dan telah memberi persetujuan terhadapnya. Plaintif-plaintif selanjutnya berhujah bahawa permintaan defendan kepada plaintif kelima untuk menyediakan perancangan untuk menangani masa hadapan operasi penyelaman dan pemuliharaan ke atas pulau telah mewujudkan harapan yang sah bahawa plaintif-plaintif dibenarkan untuk terus beroperasi ke atas pulau meskipun selepas Malaysia telah mendapat kedaulatan terhadap pulau tersebut. Defendan berhujah bahawa ia telah dinamakan dengan salah di dalam guaman ini dan bahawa BKN sepatutnya dijadikan pihak kepada guaman ini. Adalah menjadi hujahan defendan bahawa pada masa matan bidang kuasa pentadbiran pulau tersebut bukanlah terletak pada defendan tetapi pada BKN berikutan fakta bahawa pada 24 September 1997 pulau tersebut telah diisytihar sebagai kawasan larangan mengikut Perintah Kawasan Larangan dan Tempat Larangan 1997, Akta Persekutuan. Defendan selanjutnya berhujah bahawa bermula dari 1 Februari 1933, kesemua hak-hak sebelum atau hak milik terhadap pulau tersebut adalah terhapus dan bahawa pulau tersebut tidak boleh digunakan bagi sebarang tujuan lain selain daripada tempat perlindungan burung.

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan kos untuk ditaksir:

(1) Hujahan defendan bahawa BKN adalah pihak yang wajar bagi tindakan ini tidak pernah diplid oleh defendan dan tiada percubaan dibuat untuk meminda pliding-pliding semasa perbicaraan. Tambahan, fakta bahawa pulau tersebut telah diisytiharkan kawasan larangan tidak bermaksud bahawa defendan telah melepaskan kedaulatan pulau tersebut memandangkan pemilikan masih dengan defendan. Sekiranya hujahan

defendan dibenarkan, ini bermaksud bahawa Kerajaan Persekutuan boleh menjadikan mana-mana tanah negeri sebagai tanah persekutuan melalui deklarasi semata-mata berikutan Akta Kawasan Larangan dan Tempat Larangan tetapi itu bukanlah dan tidak seharusnya menjadi status hubungan di antara Kerajaan Persekutuan dan negeri. Dalam mana-mana kejadian, tingkah laku defendan pada masa matan adalah berlawanan dengan hujahan defendan bahawa ia tidak lagi mempunyai bidang kuasa pentadbiran ke atas pulau tersebut. Oleh demikian, penghujahan defendan bahawa plaintif-plaintif telah menyaman pihak yang salah ditolak (lihat perenggan 34, 37 & 39–40).

(2) Apabila menggunakan undang-undang terhadap apa yang membentuk persetujuan kepada asas fakta, adalah didapati bahawa defendan telah bersetuju dengan kehadiran plaintif-plaintif di pulau tersebut. Meskipun warta pemberitahuan memperuntukkan bahawa pulau tersebut adalah untuk digunakan sebagai tempat perlindungan burung, ini tidak bermaksud bahawa pulau tersebut tidak boleh digunakan bagi sebarang tujuan lain, terutama sekali apabila tujuan tersebut tidak mendatangkan kemudaratan atau menghalang tujuan pemeliharaan burung yang dideklarasikan. Daripada keterangan yang tidak dipertikaikan tentang kehadiran pengendali penyelaman di pulau tersebut untuk bertahun lamanya, adalah diputuskan bahawa defendan berpendapat bahawa kehadiran pengendali penyelaman tidak menghalang atau memudaratkan penggunaan pulau tersebut sebagai tempat perlindungan burung. Dalam kes ini, tidak terdapat keterangan bahawa kewujudan pengendali-pengendali telah memudaratkan spesies burung tersebut (lihat perenggan 44, 47 & 51).

(3) Berdasarkan keterangan, adalah didapati bahawa plaintif-plaintif telah memperoleh faedah-faedah ekonomi daripada operasi penyelaman mereka, paling tidak pun, berdasarkan lesen yang dengan tersirat diberikan oleh defendan. Lesen tersebut boleh ditarik balik apabila polisi diubah dengan membayar pampasan yang berpatutan kepada plaintif-plaintif. Oleh itu, plaintif-plaintif berhak terhadap pampasan atau ganti rugi yang ditentukan oleh jangka masa yang diberikan kepada mereka untuk menggulung perniagaan mereka di pulau tersebut. Berdasarkan kepada keadaan kes ini, terdapat pelanggaran harapan yang sah memandangkan plaintif-plaintif tidak diberikan notis berpatutan untuk menggulung perniagaan mereka. Jangka masa dan ganti rugi akan ditentukan oleh pendaftar (lihat perenggan 63).]

Notes

For cases on licences generally, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3611–3635.

For cases on parties generally, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5512–5761.

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (folld)
De Bussche v Alt (1878) 8 Ch D 286, CA (folld)
Glasson v Fuller [1922] SASR 148 (refd)
Hadmor Productions Ltd and others v Hamilton and another appellants [1983] 1 AC 191, HL (refd)
Hj Abdillah bin Hj Abdul Hamid v Assistant Collector of Land Revenue, Semporna & Anor Suit No T-21–58 of 2006, HC (folld)
Inwards and others v Baker [1965] 1 All ER 446, CA (folld)
Public Textiles Berhad v Lembaga Letrik Negara [1976] 2 MLJ 58, FC (refd)
PP v Lim Ah Heng & Anor [1999] 1 SLR 827, HC (not folld)
R v Secretary of State for the Home Department, ex parte Khan [1985] 1 All ER 40, CA (refd)
R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening) [2000] 3 All ER 850, CA (distd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chee Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 141; [2010] 1 CLJ 381, FC (folld)

Legislation referred to

Environmental Public Health Act [SG]
Protected Areas Order 1997
Protected Areas and Protected Places Act 1959
Protected Areas and Protected Places Act [SG] s 5(1)
Sabah Land Ordinance (Cap 68) s 28

Alex Decena (Jayasuriya Kah & Co) for the first plaintiff.
Douglas Primus (Shireen Sikayun with him) (Lee & Thong) for the second to fifth plaintiffs.
Roderick Fernandez (Zaleha Rose Pandin and Dgku Fazidah Hatun Pg Bagul with him) (State Attorney General's Chambers, Sabah) for the defendant.

David Wong J:

PROCEEDINGS

[1] The claims of the first, second, fourth and fifth plaintiffs ('the plaintiffs') against the defendant are for, inter alia, declaration, damages/compensation for the wrongful demolition of their buildings and or loss of equitable/proprietary interests in their dive resorts on Sipadan Island and/or the loss of or breach of their legitimate expectations.

[2] No evidence was called by the defendant while the plaintiffs called six witnesses. The case for the defendant is premised by evidence elicited from crossexamination of the plaintiffs' witnesses and on the agreed facts proposed by the parties.

[3] At the commencement of trial, parties agreed that only the issue of liability is to be tried and it is on that basis that this trial proceeded.

AGREED FACTS

[4] The parties' agreed facts are as follows.

[5] Sipadan Island has been reserved as a bird sanctuary under s 28 of the Land Ordinance (Sabah Cap 68) since 1933 by virtue of *Gazette* Notification No 69/1933.

[6] The first to fourth plaintiffs are companies duly incorporated in Malaysia, operating and running resorts with dive facilities complete with full board and lodging at their respective sites on Sipadan Island since 1990s until 1 January 2005.

[7] The defendant had as early as 1992 directed the operators to stop erecting further building and structure on the Island.

[8] On 6 October 1994, the first plaintiff wrote a letter to Datuk Tham Nyip Shen the then Minister of Tourism and Environmental Development in his personal capacity, in respect of the position of the operators on the island.

[9] On 10 February 1995, the defendant issued a show cause letter to the second plaintiff informing the second plaintiff that its buildings were erected and/or constructed on a reserved state land and were given 14 days to response thereof.

[10] On 24 September 1997, the island was declared as a protected area under the Protected Areas and Protected Places Act 1959 and therefore all movement and conduct on the Island since then are under the control of Biro Keselamatan Negara ('BKN').

[11] In compliance with a directive from BKN through its letter dated 8 November 1997, the first to fourth plaintiffs together with Borneo Divers & Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort & Tours Sdn Bhd incorporated the fifth plaintiff to handle all matters related to the dive activities with BKN on behalf of the six dive operators on Sipadan Island.

[12] Since 1997, the first to fourth plaintiffs including Borneo Divers & Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort & Tours Sdn Bhd have been dealing with BKN in all matters pertaining to the number of divers/tourists and workers staying on the island including the number of structures/buildings that could be set up/remained.

[13] By a letter dated 16 May 1998, BKN informed the fifth plaintiff and others directing that divers/tourists as well as workers gradually be reduced according to requirements stated in the letter.

[14] By a letter dated 12 November 1998, the BKN sought the first to fourth plaintiffs' cooperation in providing information on the plaintiffs' activities and investments on the island. This information was sought in preparation on Malaysia's claim on the sovereignty of Sipadan Island at the International Courts of Justice ('ICJ'). The plaintiffs complied and listed their respective involvement as follows:

i. Sipadan Dive Centre RM1,655,030.00

ii. Borneo Sea Adventures Sdn. Bhd. RM1,040,000.00

iii. Syarikat Ramai Benar Sdn. Bhd. RM1,580,000.00

iv. Pulau Bajau Sdn. Bhd. RM1,500,000.00

[15] BKN did not dispute these figures.

[16] With effect from 1 February 1999, the number of divers/tourists staying overnight was reduced from an average of 140 to 80 and the number of workers on the island was reduced from 180 to 23 on the directive of BKN. Some buildings were demolished on the instructions of BKN as the BKN had allocated only 14 divers/tourists for each resort.

[17] On one of the meetings with BKN, BKN had directed the first to fourth plaintiffs including Borneo Divers and Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort and Tours Sdn Bhd to come up with proposals to address the question of the future of diving operations on the island and conservation thereof.

[18] Accordingly, the fifth plaintiff had prepared a proposal titled 'Proposed Master Planning and Redevelopment of Pulau Sipadan, Borneo' (28 June 1999) for BKN's consideration and comments. On the fifth plaintiff's initiative a second proposal titled: 'Eco-Tourism Management Plan — Summary, Sipadan Island' was prepared by them and submitted to the Ministry of Tourism for its consideration. The second proposal deals with various conservation matters affecting the island.

[19] BKN and the first to fourth plaintiffs including Borneo Divers and Sea Sports (Sabah) Sdn Bhd and Pulau Sipadan Resort and Tours Sdn Bhd have engaged in many meetings to discuss security, number of divers/tourists and workers who will be allowed to stay overnight on the island, conservation aspects and structures/buildings on the island.

[20] On 24 September 2003, the Ministry of Tourism, Culture and Environment held a meeting which was attended by the six operators. The six operators were informed as follows:

2. Perkara-perkara yang berbangkit

2.1 Kawalselia Pembangunan dan Pelancongan Pulau Sipadan dan Pulau Litigan

2.1.1 Berikutan dengan keputusan International Court of Justice (ICJ) berkenaan dengan Pulau Sipadan, maka Negara Malaysia mestilah mematuhi keputusan tersebut dari segi 'international obligation'. Selaras dengan itu, Jemaah Menteri Kerajaan Pusat telah membuat keputusan supaya kawalselia pembangunan dan pelancongan Pulau Sipadan dan Pulau Ligitan diletakkan di bawah Jawatankuasa Bersama antara Kerajaan Persekutuan dan Kerajaan Negeri.

Walaupun demikian Pulau Sipadan masih di bawah kawalan Badan Keselamatan Negara dan mengikut arahan, sepatutnya Pulau Sipadan dikosongkan dengan serta merta selepas keputusan ICJ dalam tempoh 3 (tiga) bulan berkuatkuasa mulai 1 Disember 2003. Akan tetapi Kerajaan Negeri telah mengambilkira kepentingan operator-operator pelancongan yang beroperasi di Pulau Sipadan dan memberi masa sebelum hujung tahun 2004 untuk mereka mengosongkan pulau tersebut.

Berlanjutan dengan itu operator-operator pelancongan yang beroperasi di Pulau Sipadan dinasihatkan agar tidak menerima apa-apa tempahan selepas hujung tahun 2004. Tindakan ini diambil bagi membolehkan operator-operator pelancongan mengosongkan pulau tersebut kerana hanya aktiviti-aktiviti menyelam sahaja yang boleh dijalankan tanpa tinggal di pulau berkenaan.

2.1.2 Pejabat Timbalan Setiausaha Kerajaan Negeri akan mengeluarkan surat berkenaan dengan arahan ini kepada operator-operator pelancongan.

2.2 Komen Dari Operator-Operator Pelancongan Operator-operator Pelancongan yang beroperasi di Pulau Sipadan pada masa ini memohon agar mereka diberi tempoh bagi membolehkan mereka berkenaan dengan arahan untuk mengosongkan Pulau Sipadan memandangkan mereka mempunyai komitmen terhadap tempahan dari pengguna luar negara bagi tahun 2004.

Operator-operator Pelancongan akan memaklumkan kepada Pejabat TSKN (P) hasil dari perbincangan mereka.

[21] On 5 January 2004, the first plaintiff, Sipadan Dive Centre Sdn Bhd wrote to Datuk Monica Chia, the then permanent secretary of the Ministry of Tourism, Culture and Environmental Development disputing the accuracy of minutes 2.2 above and asking the government do inform the plaintiffs of the government's stand and policy in writing.

[22] On 26 March 2004, a notice issued by the deputy state secretary's office to all six operators to demolish all structures/buildings on the island and vacate. The operators were given until 31 December 2004. This directive was on the ground that Malaysia has to fulfill its international obligations following the decision of the International Court of Justice on the ownership of Sipadan Island.

[23] By a letter dated 2 April 2004, the first plaintiff wrote to the defendant requesting clarification on 'Malaysia's international obligations'.

[24] In reply to the first plaintiff's letter dated 2 April 2004, the defendant issued another letter dated the 19 April 2004 citing conservation matters as reason for issuing the directive to vacate the island.

[25] On 26 May 2004, another notice was issued by the Assistant Collector of Land Revenue, Semporna to the six operators informing them to demolish all building and structures belonging to them and to vacate the island on or before 31 December 2004.

[26] At a meeting requested by the operators held on the 24 December 2004 with BKN and subsequently confirmed by a letter dated 27 December 2004, the BKN informed all operators that the demolition and removal exercise of the structures shall commence on the 1–21 January 2005 that is three weeks.

[27] By 1 January 2005, the first to fourth plaintiffs ceased all operations on the island and begun dismantling the buildings and removed all that could be removed.

[28] On 15 January 2005, the BKN faxed over to the first plaintiff a letter dated 14 January 2005 informing the first plaintiff that they have no objection for them to be on the island to 'menjaga harta benda Syarikat dan kerja-kerja pemunggahan'. This approval is only for the period from the 1 January 2005–21 January 2005.

[29] On 20 January 2005, a meeting was held between representatives of the plaintiffs and senior government officers including officers from BKN at the State Attorney General's Chambers and chaired by the deputy state secretary Datuk Awang Hj Samat where the operators requested for at least two months. However the plaintiffs were informed that due to security reasons every structure on Sipadan Island belonging to the plaintiffs must be demolished by the 21 January 2005.

[30] On the same day, Messrs Lee & Thong wrote to Messrs CJ Liew & Co expressing the plaintiffs' view on the said meeting. Messrs CJ Liew & Co then wrote a letter addressed to Datuk Awang Hj Samat enclosing the letter from Messrs Lee & Thong.

[31] On 5 February 2005, pursuant to the decision of jawatankuasa the state secretary issued a notice giving further extension of time until 28 February 2005 to the six operators to demolish the buildings and structures on the island. Failure to do so, the demolition and removal of the buildings and structures materials will be carried out by the government and the expenses incurred will be borne by the operators.

[32] Despite the said extension, the first to fourth plaintiffs did not complete the demolition as directed vide the notices. These buildings and structures were subsequently demolished and removed by BKN.

ISSUES

[33] From the agreed facts and the submissions from counsel, there are in my view three issues and they are:

(a) Whether BKN should be responsible and be made a party to the Suit?

(b) Whether there was recognition and acquiescence on the part of the defendant with regards to the presence of the plaintiffs on Sipadan Island and if so whether the plaintiff is entitled to compensation from the defendant?

(c) Whether adequate time was given to demolish and remove all building structures on Pulau Sipadan?

Issue (a)

Whether BKN should be responsible and be made a party to the suit

[34] Counsel for the defendant submits that the defendant had been wrongly named in this suit. She bases her submission on the ground that the administrative jurisdiction of Pulau Sipadan at the material time was not with

the defendant but with National Security Council (BKN) by the virtue of the fact that on 24 September 1997, Pulau Sipadan was declared a protected area pursuant to the Protected Areas Order 1997, a Federal Act. BKN, through its authorised officer, has, among others, the following powers:

(a) To give directions as to movement and conduct of all persons coming to Pulau Sipadan together with powers of search and powers of detention.

(b) To remove any person from the island.

(c) To use deadly force to stop and arrest any entry to the island.

(d) To take any defensive measures to protect the island including measures endangering life.

[35] Counsel also refers to the Singapore case of *Public Prosecutor v Lim Ah Heng & Anor* [1999] 1 SLR 827 where the respondent was charged under the Singapore Environmental Public Health Act (Cap 95) ('EPHA') with abetment of the commission of the offence of illegal dumping in a 'public place' and raised the defence that the site of the offence is not a public place but a protected place as it had been made a 'protected place' under s 5(1) of the Singapore Protected Areas and Protected Places Act (Cap 256) ('PAPPA'), which is in pari materia to the Malaysian Act. This defence was sustained at the district court and the respondents were acquitted. On appeal to the Singapore High Court, the acquittal was reversed where the court said this:

> Even on a cursory reading of the provisions in PAPPA, it was clear that Parliament regarded any breach of s 5 as a serious act. This was evidenced by the statutory powers given to authorised personnel remove trespassers from protected places (s 5(3)) as well as to arrest them (s 9). Further, s 9 provided that persons who attempted to enter or who were in a protected place and who failed to stop after being challenged three times by an authorised officer to do so could be arrested by force, such force if necessary extending to the voluntary causing of death. Offenders could also be prosecuted under s 7, and be liable upon conviction to a fine of $1,000 or to imprisonment for a term of two years or both. Since it was clear that the public did not have access in right to the site …

[36] I have read the judgment of that case and am of the view that it has no application to the case at hand. That case concerns on the definition of what 'public place' encompasses which is not the issue at hand.

[37] In any event, I agree with counsel for the plaintiffs that this contention was never pleaded by the defendant and no attempt was made to amend the pleadings during the trial. Counsel also refers the court to *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chee Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665 where James Foong FCJ says:

> On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[38] Lord Diplock in *Hadmor Productions Ltd and others v Hamilton and another appellants* [1983] 1 AC 191 at p 233 expressed the same sentiment on the importance of pleadings:

> Under our adversary system of procedure, for a single judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

[39] Further the fact that Pulau Sipadan was declared a protected area does not mean that the defendant has given up sovereignty of the island as ownership remains with the defendant. To sustain the contention of the defendant would mean that the Federal Government could turn any state land into federal land by a mere declaration pursuant to Protected Area and Protected Places Act. That is not and cannot be the status of the relationship between the federal and state governments.

[40] In any event, the conducts of the defendant during the material times are contrary to the assertion by counsel for the defendant and they are these:

(a) The issuance of the letter dated 26 May 2004 by the assistant collector of land revenue to the plaintiffs.

(b) The notices to demolish building structures on Pulau Sipadan dated 26 March 2004 and 19 April 2004 were issued by the chief minister department and signed by the deputy state secretary who had also signed the letter of extension of period to demolish.

(c) Meetings with the plaintiffs were always held with the defendant through its civil servants such as the deputy state secretary, the permanent secretary of the Ministry of Tourism, the state attorney general, Director of Sabah Parks and the Semporna District Officer.

(d) It was the defendant which had demolished the structures and buildings on Pulau Sipadan.

[41] Accordingly I reject the submission that the plaintiffs had sued the wrong party.

Issue (b)

Whether there was recognition and acquiescence on the part of the defendant with regards to the presence of the plaintiffs on Sipadan Island and if so whether the plaintiff is entitled to compensation from the defendant

[42] From the outset it should be noted that the defendant has chosen not to call any rebutting evidence to that of the plaintiffs. Under such circumstance, Gopal Sri Ram FCJ in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 141; [2010] 1 CLJ 381 sets out the approach the court should take:

> In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 at p 128:
>
> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true. Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[43] Applying the above principle, the evidence of the plaintiffs' witnesses will be presumed to be true and what confronts me is to determine whether those evidence amounts in law to a recognition and acquiescence by the defendant of the presence of the plaintiffs on Pulau Sipadan. The plaintiffs' case relies in substance on the evidence of PW1 who is the former permanent Secretary of State Ministry of Tourism and Environment Department. Of significance is the following evidence:

> Q18Was there a tacit recognition by the State Government on the presence of these operators on the island?

A: Yes. Though there is no official confirmation to that effect.

Q19: Why is this so?

A: It was a sensitive issue because of the claim by Indonesia that Sipadan island belonged to them. When Datuk Pairin Kitingan was the Chief Minister of Sabah I was verbally instructed by him to ensure that the Native Customary rights on the island and the right of the traditional egg collectors to collect turtle eggs were to be respected and protected and to remain intact. I was also to ensure that there would be minimal disturbance and damage to the environment and conservation measures on a sustainable basis had to be enforced. Meanwhile I was to allow the presence of the resort operators on the island.

Q20: To your knowledge as the then Permanent Secretary to the Ministry of Tourism why didn't the State Authorities force the Operators to vacate the island leaving no operator there except for the Wildlife Department staff?

A: There was a fear that once all the operators leave the island, there would be a vacuum, others may come in forcibly and occupy the island. Presence of the foreign guests on the island was important to Malaysia. Further we feared that the local fishermen may come and 'bomb' the area, thus destroying the marine life and rich coral habitats there as the Wildlife Department did not have adequate manpower and resources. (please refer to Page 10 to 11 NOP).

Q9: As far as you are personally aware, did the State Government acquiesce to the presence of these dive resort operators on the island?

A: Yes, the State Government was aware of the Dive Resort Operators on the island and have acquiesced to their presence. (please refer to Page 8 Line 3 NOP)

Q10: Can you recall the agreement entered between Borneo Divers, Pulau Sipadan Resort and Sipadan Dive Centre with the turtle egg collectors on Sipadan Island?

A: Yes.

Q11: Why were the agreements entered?

A: For conservation reasons. The egg collectors have been collecting turtle eggs since time immemorial. It was feared that if this practice continues, the turtles may become extinct. It was a win-win situation whereby the egg collectors would get paid for the eggs and these eggs will be allowed to be hatched on the island. The agreements were signed at the Ministry of Tourism and witnessed by the then Minister, Datuk Tan Kit Sher, (please refer to Page 8 Line 6 to 16 NOP)

[44] PW1 had also referred to the relationship between the plaintiffs and Sabah Tourism Board where the plaintiffs were invited by the board to attend various events overseas to promote Sabah as a tourism destination. Counsel for the plaintiffs also submits on the significance of this relationship in that the board is a creature of legislation under the Ministry of Tourism and Environmental Development; hence the defendant by virtue of that relationship had acknowledged the existence of the plaintiffs on the Pulau Sipadan. Apart from this relationship counsel also refers to the various licences with Jabatan Laut and trading licences with Semporna District Council which

the plaintiffs possessed to operate their business on Pulau Sipadan. The fact that BKN requested information from the plaintiffs for the Malaysia Government's claim in the World Court was also relied on by the plaintiffs' counsel. This information given includes million of ringgits invested by the first, second and fourth plaintiffs and this evidence was never rebutted.

[45] The law on what amounts to acquiescence is explained by Edgar Joseph Jr FCJ in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 238 where he quoted with approval Poole J in *Glasson v Fuller* [1922] SASR 148:

> Acquiescence is used in two senses. If one stands by while he sees the violation of his rights in progress, and takes no steps to intervene, he is said to have acquiesce in the violation, and he may be thereby debarred from his remedy in respect of it. This is acquiescence in the true sense … Acquiescence in the strict sense implies that the party acquiescencing has abandoned his right, or he is estopped from asserting it. Acquiescence in this sense is more than an instance of estoppel by words or conduct.

[46] And His Lordship also referred with approval what Thisiger LJ said in the case of *De Bussche v Alt* (1878) 8 Ch D 286 at p 314 and that is:

> If a person having a right, seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really do induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed, he cannot afterwards be heard to complain of the act.

[47] Applying the above principle to the factual matrix I have no problem in finding that the defendant had acquiesced to the presence of the plaintiff on Pulau Sipadan.

[48] However the defendant's rebuttal is simply that the plaintiffs cannot acquire any interest at all as the defendant is prevented in law from any acquiesce. The law which counsel for the defendant is referring to is the gazette notification dated 1 February 1933 declaring that Pulau Sipadan is 'reserved for the purpose of bird sanctuaries' pursuant to s 28 of the Land Ordinance which reads as follows:

> S 28 (1) The Yang di-Pertua Negeri may reserve any State lands which in his opinion are required for any public purpose or for a residential reserve. Such reservation shall fully describe the land and the purpose for which it is reserved and shall be conclusive evidence that the land is reserved for a public or residential purpose.
>
> (2) When any land has been reserved under this or any previous Land Ordinance and such reservation has not been revoked, every disposition thereof, for the purpose for which such reservation was made, shall be void.

[49] Relying on this provision of law and the declaration of Sipadan Island as a bird sanctuary counsel for the defendant submits two propositions:

(a) with effect from 1 February 1933 all rights prior or title on Pulau Sipadan are extinguished; and

(b) Pulau Sipadan cannot be used for any other purpose other as a bird sanctuary.

[50] In respect of proposition (a), suffice for me just to refer to and adopt the judgment in *Hj Abdillah bin Hj Abdul Hamid v Assistant Collector of Land Revenue, Semporna & Anor* Suit No T-21–58 of 2006 where Linton Albert J held that the native customary rights of plaintiff there to collect turtle eggs on Pulau Sipadan remains intact despite the existence of legislation.

[51] In respect of proposition (b), counsel for the defendant submits that any lease agreement with the plaintiffs would amount to a disposition which the defendant cannot do as it is an illegal act. Whether this contention can be sustained depends on the meaning of the word 'disposition' in the context of the s 28(2) of the Land Ordinance and the 1933 *Gazette* Notification No 69. The intention of the notification is self-evident and that is to use Pulau Sipadan as bird sanctuaries to preserve the bird species. But does that mean that Pulau Sipadan cannot be used for any other purposes even if it does not harm or impede the declared purpose of bird preservation. From the undisputed evidence of the presence of dive operators in Pulau Sipadan for so many years, the only conclusion I can make is that the defendant had held the view that their presence did not impede or harm the use of Pulau Sipadan as bird sanctuaries. Further, as pointed out by counsel for the plaintiffs, the defendant, despite having gazetted various islands as turtle sanctuaries and National parks, had allowed private operators to develop the tourism industry by way of licence agreements with the relevant authorities of the defendant. These conducts in my view lead to the conclusion that the word 'disposition' does not include licence agreements I referred to just now. To interpret it otherwise would tie the hands of the defendant in developing the economic well being of the State of Sabah and also presume that the defendant had been involved in illegal businesses in promoting the Sabah as a tourism destination, which presumption should not be made lightly bearing in mind the status of the defendant. The declaration of any reservation is only to ensure that well being of what is declared preserved. In the present case, there is no evidence that the existence of dive operators had harmed the bird species. In fact the contrary is true as after the removal of the plaintiffs from Pulau Sipadan there was an abortive attempt to build a RM4.5m tourist facility on Pulau Sipadan.

[52] As for the submission on estoppel and the reliance of the case of *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58 by counsel for the

defendant, it has been correctly rebutted by counsel for the plaintiffs. Suffice for me to say that there is no 'positive duty' imposed by s 28 of the Land Ordinance as in that case, hence the principle of estoppels applies in this case.

[53] For reasons stated above, I find that the defendant had acquiesced and recognised the presence of the plaintiffs on Pulau Sipadan.

[54] This brings me to the question of compensation which requires me to discuss whether the plaintiffs had, in the circumstances of this case, acquired 'legitimate expectations'. Counsel for the plaintiffs submits that they have acquired two types of legitimate expectations, namely procedural and substantive. Procedural expectation relates to the right of the plaintiffs to be heard before the defendant makes any decision. Substantive expectation relates to the expectation of being allowed to continue to operate their dive business as before on Pulau Sipadan. In respect of procedural expectation, *R v Secretary of State for the Home Department, ex parte Khan* [1985] 1 All ER 40 Watkins LJ held that:

> where a member of the public affected by a decision of a public authority had a legitimate expectation based on a statement or undertaking by the authority that it would apply certain criteria or follow certain procedures in reaching its decision, the authority was under a duty to follow those criteria or procedures.

[55] In the context of this case, it is undisputed that the fifth plaintiff was requested to prepare a master plan proposal for Pulau Sipadan and as such it is submitted that the defendant had created a legitimate expectation that the plaintiffs would be consulted on any issue on the operation of Pulau Sipadan as a tourism spot.

[56] In respect of substantive expectation, the plaintiffs submit that the defendant had created the expectation that the plaintiffs would be allowed to continue operating on the island even after Malaysia had gained sovereignty over the island. Evidence which the plaintiffs rely on is that the defendant actively used the presence of the plaintiffs on the island to promote Malaysia's tourism industry and to argue Malaysia's sovereignty rights over the Island at the International Court of Justice. PW2 in his testimony said this:

> Q.7 When the BKN requested the information did they indicate to you that you will be asked to vacate Sipadan in the event that the Court decides in favour of Malaysia?
>
> A. No. Though we expected that we would be asked to leave if Indonesia wins the case.

[57] This part of the testimony was never rebutted by the defendant. The case of *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening)* [2000] 3 All ER 850 provides an example of what amounts to substantive legitimate expectation. In that case, a tetraplegic victim of a road accident in 1993 was housed in a health institute called Mardon House, a NHS facility for the long term disabled. It was represented to the victim by the health authority that he could stay at Mardon House 'for as long as they chose'. When the health authority decided to close Mardon House without providing alternative suitable accommodation, the Court of Appeal held that, in view of the representation, a breach of this legitimate expectation amounted to an abuse of power and the substantive promise was upheld.

[58] Counsel for the plaintiff also relies on what is stated in *Inwards and others v Baker* [1965] 1 All ER 446 and it is this:

[59] Lord Denning MR, at pp 448(G):

> ... if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as entitle him to stay. He has a licence coupled with an equity.
>
> All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there.

[60] Dankwerts LL at p 449(1):

> ... this is one of the cases of an equity created by estoppel or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated.

[61] Applying those principles to the circumstances in this case, I have no hesitation in finding that the plaintiffs have acquired some sort of legitimate expectations and what that is depends on the circumstances herein.

[62] However before I proceed further, I must distinguish the case of *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening)* to the case at hand. In that case, there was a national health service provided by the health authority which covered the services required by the tetraplegic victim and the issue there was whether the assurance of the health authority had induced a legitimate expectation that the victim will be looked after as long as she wished. Here there is no such service

being provided by the defendant. In fact the dive operators have been conducting business in the tourism industry on the Pulau Sipadan and I assume making profits from their ventures. In short the plaintiffs have been deriving benefits from their presence on Pulau Sipadan. This fact in my view distinguishes this case to *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening)*. Further the reliance of the Court of Appeal in that case on article 8 of the European Convention on Human Rights and Fundamental Freedoms which gives the victim the 'right to respect her home' makes it wholly inappropriate for this court to rely on their conclusion.

[63] Reverting to the nature of the legitimate expectation, it is conceded by the plaintiffs that the defendant is entitled to change its policy on the use of Pulau Sipadan but that does not mean that it is free to ignore the plaintiffs' legitimate expectation. The policy as I understand it is that since the demolition of the plaintiffs' buildings there is to be no tour operators stationed on Pulau Sipadan and all diving activities around the island shall be limited to divers ferried to Pulau Sipadan from the surrounding resorts. Though there was an attempt after January 2005 by the defendant to allow a single operator to be stationed on Pulau Sipadan, this never eventuated. And it can be said that because of this attempt the plaintiffs felt more aggrieved why they were not consulted prior to their departure in January 2005 or given a chance to submit to the defendant that they should be allowed to remain on the island bearing in mind the fifth plaintiff was requested to do master plan. Be that as it may, the reality now is that no corporate entity is stationed on Pulau Sipadan. That being the case, the plaintiffs' expectation that they be allowed to remain on Pulau Sipadan or given a replacement area in nearby island cannot be sustained as they had not been discriminated against by the defendant. Furthermore, as I have said earlier the plaintiffs who had operated on Pulau Sipadan had obtained economic benefits from it and their operation was conducted at best on a licence impliedly given by the defendant. That licence cannot be for perpetuity and in my view can be revoked only if there is a change of policy in the use of Pulau Sipadan and/or by paying reasonable compensation to the plaintiffs. As there is now a change of policy, the plaintiffs are entitled to be paid reasonable compensation or damage by the defendant. This amount shall be measured by determining the length of time for the plaintiffs to wind down their businesses for Pulau Sipadan. That length of period and damage shall be determined by the registrar.

Issue (c)

Whether adequate time was given to demolish and remove all building structure on Pulau Sipadan

[64] In determining this issue, I firstly need to decide which notice issued by

the defendant or BKN can be considered as the valid notice to demolish. The circumstance in which notices were issued is this. The first meeting of the relevant parties was on 24 September 2003 where the Ministry of Tourism, Culture and Environment informed the dive operators on Pulau Sipadan of the Federal Cabinet's decision to vacate the island and the reasons were as follows:

> mestilah mematuhi keputusan tersebut dari segi international obligations … sepatutnya Pulau Sipadan dikosongkan dengan serta merta selepas keputusan ICJ dalam tempoh 3 (tiga) bulan berkuatkuasa mulai 1 December 2003. Akan tetapi Kerajaan Negeri telah mengembalikan kepentingan operator-operator pelancongan yang beroperasi di Pulau Sipadan dan memberi masa sebelum hujung tahun 2004 untuk mereka mengosongkan pulau tersebut …

[65] After that meeting, the first notice which came from the defendant was on the letter date 26 March 2004 which requested all the six dive operators to demolish all structural buildings on the island (p 129, exh C). That letter was disputed by the first plaintiff on the ground that ICJ never imposed any 'international obligations' on Malaysia. Despite that letter of protest, the defendant on 19 April 2004 issued another letter (p 131–132, exh C). Faced with the two letters, the plaintiff took legal action to quash the two letters in Suit No K25–08 of 2004. However on 26 October 2004, the suit was struck out by the court with liberty to file afresh to accommodate parties to settle the dispute amicably (refer to pp 183 and 180, exh C). The proposed settlement by the six dive operators was to relocate to the nearby islands of Tun Sakaran Marine Park but this was rejected by the defendant which had wanted the operators to move to islands not within the Tun Sakaran Marine Park and enter into an agreement with the land owners there.

[66] On 27 December 2004 BKN requested the six dive operators to begin and finish dismantling by 21 January 2005. It is undisputed fact that the last guest to leave Pulau Sipadan was 31 December 2004.

[67] From the above, it can be seen that the defendant did not want the plaintiffs to know its then policy which was to allow one single operator on the island. The present policy of not allowing any operator on the island was fashioned only by public pressure sometime 2007. This factor must be taken into account in determining what would amount to 'adequate notice' for the simple reason that during the time of negotiation between the defendant and the plaintiffs, there has not been full disclosure by the defendant.

[68] Taking into consideration of the circumstances of this episode, it is my view that that notice to dismantle should commence from 1 January 2005 but the only remedy available to the court to make is to order the defendant to pay damages for items which were useful to the plaintiffs but were not able to

remove from the island because of the short notice given by the defendant. The length of that notice shall be determined by the registrar.

[69] Accordingly for all the reasons given above, I make the following orders:

(a) Damages to be assessed by the registrar for breach of legitimate expectation — ie failure to give a reasonable notice to wind down the business of the first, second, fourth and fifth plaintiffs.

(b) Damages to be assessed by the registrar for loss of buildings in view of the failure to give adequate notice to dismantle.

(c) Interest at the rate of 8%pa on the assessed amounts from the date of this judgment to full settlement of the same.

(d) Costs to be taxed unless agreed to the plaintiffs.

Plaintiffs' claim allowed with interest and costs to be taxed.

Reported by Kohila Nesan